(27)

No. 90-1014

IN THE

Supreme Court of the United States

October Term, 1990

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF NATHAN BISHOP MIDDLE SCHOOL, et al.,

Petitioners,

v.

DANIEL WEISMAN, ETC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, AMERICAN JEWISH COMMITTEE, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, PEOPLE FOR THE AMERICAN WAY, NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, NEW YORK COMMITTEE ON PUBLIC EDUCATION AND RELIGIOUS LIBERTY AND JAMES E. ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) IN SUPPORT OF RESPONDENTS

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Interest of Amici

The amici joining in this brief are Christian and Jewish religious organizations, one secular organization, and one coalition of religious and secular organizations, all with a special interest in religious liberty. These amici offer special expertise in the history of religious liberty and religious conflict, and in the impact of this Court's rules on religious belief and practice.

These amici are concerned principally with rejecting Petitioners' proposed coercion rule, and with preserving this Court's settled rule that government must be neutral toward religion. Amici believe that religion and religious liberty have benefitted from that rule, and that Petitioners' proposed coercion rule would be harmful to religion and to religious liberty. The bulk of this brief is devoted to the choice between the two rules, defending the neutrality rule in terms of constitutional text, history, precedent, and policy.

All but one of these amici agree that the specific practices at issue in this case are unconstitutional under

either a neutrality rule or a coercion rule; the remaining amicus is acting on the basis of a policy statement that speaks to the issue of principle but not to the particular facts. These amici do not agree on more difficult hypothetical cases. Some of these amici believe that any government-sponsored prayer is unconstitutional, in any format and with any audience. Some of these amici believe that government-sponsored prayers are permissible in certain limited circumstances, but that those circumstances are plainly not present here, and that it is not necessary to define them with precision in this case. All of these amici agree that Petitioners' coercion test is a fundamental threat to religious liberty.

Because many amici have joined in a single brief, the interests of individual amici are stated in appendices. This brief is filed with consent of the parties.

Summary of Argument

Petitioners and the United States say that their target is merely the *Lemon* test. But in fact, they would

have the Court abandon the fundamental requirement that government be neutral toward religion, and substitute instead the requirement that government refrain from "coercion." Their definition of coercion is extraordinarily narrow. Their proposal would require this Court to rewrite all its establishment clause cases, beginning with *Everson v. Board of Education*, 330 U.S. 1 (1947).

Petitioners' proposed coercion test is inconsistent with the original understanding of the Establishment Clause. The Establishment Clause must be read against the background of disestablishment in the states. Defenders of establishment everywhere tried to preserve establishment by making it less coercive, less preferential, and more inclusive. In the extreme cases of South Carolina and Virginia, establishment was reduced to a bare endorsement. These bare endorsements were rejected as establishments. Thus, the settled law of this Court -- that government endorsements of religion violate the Establishment Clause -- is firmly based in the original understanding.

The founding generation did not seriously consider the religious liberty implications of generically Protestant religious observances in public schools and government functions. Non-Protestant minorities were too few in numbers to force serious consideration of the issue. Religion in public education became controversial -- to the point of mob violence, church burnings, and deaths -- in the mid-nineteenth century, when the large Catholic immigration began.

The Catholic experience showed the necessity of applying to public schools the Founders' disestablishment principle, including the principle of no government endorsements of religion. The principle has not changed; it is still the original constitutional principle. Rather, changing social conditions have called attention to an important application of the principle, an application overlooked in the Founders' time because in their social conditions the question was merely academic.

Petitioners' coercion test would be harmful to religion and to religious liberty. Government-sponsored

religious observances politicize religion and lead inevitably to intolerance, desacralization, or both. These amici therefore believe that free exercise and disestablishment are equally important to religious liberty. In the words of the Presbyterian Church (U.S.A.), a member denomination of amicus National Council of Churches:

> Together the two clauses guarantee that the people will have the fullest possible religious liberty. The state may not interfere with the private choice of religious faith *either by coercion or by persuasion*. It may not interfere with the expression of faith either by inducing people to abandon the religious faith and practice of their choice, or by inducing them to adopt the religious faith and practice of the government's choice.

God Alone Is Lord of the Conscience: A Policy Statement Adopted by the 200th General Assembly of the Presbyterian Church (U.S.A.) (1988) at 7, reprinted in 8 J.L. & Religion --, -- (1990) (forthcoming).

Justice Kennedy's proselytizing test is constitutionally insufficient for most of the same reasons that Petitioners' coercion test is insufficient.

The final section of this brief reviews the particular prayers and practices at issue in this case, and shows

that they violate the Court's longstanding neutrality rule and also any plausible version of a coercion rule.

Argument

I. Petitioners' Proposed Interpretation Would Eliminate the Establishment Clause As an Independent Protection for Religious Liberty.

This case was litigated below as a simple dispute about the application of settled precedents to stipulated facts. In this Court, new counsel have converted the case into a sweeping attack on religious liberty.

Petitioners and the United States would have this Court abandon the settled requirement that government be neutral toward religion. Petitioners argue that "government coercion of religious conformity is a necessary element of an establishment clause violation." Pet. Br. 14.

Petitioners do not shrink from the astonishing corollaries that flow from this proposition. Thus, they claim that "government may participate as a speaker in moral debates, including religious ones." *Id.* at 37, quoting

American Jewish Congress v. City of Chicago, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting). When Americans disagree about the nature of Christ, about salvation by works or by faith, about scriptural inerrancy, about the authority of the Book of Mormon, or any other religious matter, government at all levels can take sides in those debates. The President, the Congress, or the Providence School Committee, could adopt and promulgate creeds. The only constraint would be that government could not coerce persons to believe in these creeds.

Petitioners' argument does not depend on the brevity or content of the prayers in this case. Their claim that no one was coerced would be equally true or false if the Providence School Committee awarded diplomas at a Solemn High Mass, or at a full-length worship service of any other faith.

Petitioners present themselves in this case as the protectors of religion and of religious liberty. But these are false pretensions. Their coercion standard would

leave America's many religions exposed to the corrupting intrusions of government. Government could sponsor preferred churches, preferred theologies, preferred liturgies, preferred forms of worship, and preferred forms of prayer. All this is entailed when government undertakes to sponsor a "civil religion."

Government by its sheer size, visibility, authority, and pervasiveness could profoundly affect the future of religion in America. For government to affect religion in this way is for government to change religion, to distort religion, to interfere with religion. Government's preferred form of religion is theologically and liturgically thin. It is politically compliant, and supportive of incumbent administrations. One function of the Establishment Clause is to protect religion against such interference. To government's clumsy efforts to assist religion, these religious amici say "No thanks." Too much of such "assistance" and we are undone; the Constitution protects us from assistance such as this.

Petitioners' proposed rule is inconsistent with every accepted source of constitutional interpretation. It is inconsistent with constitutional text, because it leaves no independent meaning to the Establishment Clause. Even after *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), the state would violate the Free Exercise Clause if it coerced persons to attend or participate in religious observances against their will. The proposed coercion test is also inconsistent with constitutional history, with precedent, and with sound policy toward religion. We consider each in turn.

II. The Original Meaning of Disestablishment Is That Government May Not Endorse or Advance Religion.

A. Endorsement of Religion Was the One Universal Element of Establishment in the Time of the Founders.

The classic religious establishments in the time of the Founders consisted of several elements in varying combinations. The only universal element of every establishment was government endorsement of one or more religions.

The point is most clearly illustrated by the experience of Virginia and South Carolina between 1776 and 1790. Before independence, the Church of England was the established church in these states. Each of these states initially responded to independence by attempting to eliminate coercion while preserving establishment. Each state created an establishment by endorsement: it designated an established religion while eliminating all tax support and all coercion to believe or to attend services. In each case, these reforms proved insufficient to satisfy the American demand for disestablishment, and the endorsements were subsequently repealed. These episodes show that endorsement of religion constituted establishment of religion in the political understanding of the Founders' generation. These events are summarized in several sources. Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776-1787* (1977); Thomas Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 134-51 (1986); Hamilton Eckenrode, *Separation of Church and*

State in Virginia (1910); Anson Phelps Stokes, 1 *Church and State in the United States* 366-97, 432-34 (1950).

The path to disestablishment in Virginia began in 1776, when the legislature exempted dissenters from the tax to support the Anglican Church. A tax on Anglicans remained on the books, but the legislature suspended collection. It suspended this tax annually until 1779, when the tax was permanently repealed. Curry at 135-36. "[N]o taxes for religious purposes were ever paid in Virginia after January 1, 1777." Eckenrode at 53.

The legislature in 1776 also repealed English laws restricting freedom of worship. Some provisions for licensing clergy remained in effect but were not enforced. Buckley at 36. As the leading historian of disestablishment in Virginia summarizes the situation, "Religion in Virginia had become voluntary, and a man could believe what he wished and contribute as much or as little as he thought fit to whichever church or minister pleased him." *Id.*

But it was equally clear that the legislature "had not disestablished the Church of England." *Id.* at 37. The American branch of the Church of England, soon to be known as the Protestant Episcopal Church, was still the official church in Virginia. This designation had no coercive effect on dissenters; no one was required to attend or support the Episcopal Church. The establishment was simply an endorsement.

The Episcopal clergy retained one vestige of coercive power: only they could perform legally recognized marriage ceremonies. The other denominations condemned this monopoly, but no one then or now would contend that the coercive effect of this monopoly was the only vestige of establishment. The legislature repealed this monopoly in 1780, Eckenrode at 67-69, and residual licensing rules were eliminated in 1783 and 1784. *Id.* at 80, 100; Buckley at 111-12; 1 Stokes at 383-84.

The Episcopal Church found that its establishment carried the disadvantage of legislative supervision. The church sought to escape this supervision through an act

incorporating the church and empowering it to govern itself. Such an act was passed in 1784, repealing all prior laws regulating the relationship between the state and the established church. Buckley at 106; 1 Stokes at 384-87. This made the established church independent of the state, but it did not satisfy the opponents of establishment.

The opponents insisted that the law incorporating the Episcopal Church still gave it special recognition and a preferred status. A Presbyterian resolution condemned the act as giving the Episcopal Church "Peculiar distinctions and the Honour of an important name," and making it "the Church of the State." Buckley at 165. A Baptist committee denounced it as "inconsistent with american Freedom." Buckley at 140. Other petitions said the legislature had given Episcopalians "the particular sanction of and Direction of your Honourable House." Eckenrode at 121, 122. The state's endorsement was implicit rather than explicit; the opponent's

objection was not limited to open and formal declarations of establishment.

Finally, in 1787, the legislature repealed the Episcopal incorporation act, repealed all laws that prevented any religious society from regulating its own discipline, confirmed all churches in their existing property, and authorized all churches to appoint trustees to manage their property. Buckley at 170; 1 Stokes at 394. This act finally repealed the last vestige of state endorsement of the Episcopal Church in Virginia.[1]

An even broader attempt at noncoercive establishment appeared in article 38 of the South Carolina Constitution of 1778. The entire provision is reprinted in 1 Stokes at 432-34; *see also* Curry at 149-51. The first sentence guaranteed religious toleration to monotheists, which would have included substantially the whole population. The second sentence provided that "The

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[1] The one remaining issue was disposition of church property acquired before 1777. That was finally resolved in 1802, with the Episcopal Church retaining its churches but giving up its glebes, or land for the support of clergy. Buckley at 171-72.

Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." Another sentence forbad any tax for the support of churches.

The one coercive element was that only established churches could obtain a corporate charter. Other churches apparently were organized as trusts or unincorporated associations; there was a synagogue in Charleston. Curry at 151. Churches desiring to incorporate were required to subscribe to five Protestant tenets set out in Article 38, and their ministers were required to swear an oath set out in Article 38. These provisions presumably had some tendency to coerce churches that desired the advantages of incorporation, but it would be myopic to say that incorporation rather than endorsement was the essence of this establishment. If non-established churches had been allowed to incorporate, and if free exercise had been extended beyond monotheists to include absolutely everybody, but the rest of Article 38 had been retained, Protestantism would still

have been the established religion of South Carolina. This establishment by endorsement was abolished by Article 8 of the Constitution of 1790, reprinted in 1 Stokes at 434; *see also* Curry at 151.

The general strategy of eighteenth century defenders of established religion was to propose modifications that made the establishment more inclusive, less preferential, and less coercive. The extreme instances of this strategy were the bare endorsements of South Carolina's Constitution and Virginia's Episcopal incorporation act. But other proposals pursued the same strategy with even less success.

The point is illustrated by unsuccessful proposals for general assessments to support the clergy in Virginia and Maryland. In each state, the supporters of establishment proposed a tax for the support of clergy, in which each taxpayer could designate the clergyman to receive his tax. The Virginia bill is reprinted in the Appendix to Justice Rutledge's dissent in *Everson*, 330 U.S. at 72-74. It allowed taxpayers to refuse to designate any cler-

gyman, in which case their tax would be paid to support local schools. *Id.* at 74.[2] Thus no one would be forced to support religion, and Baptists would not be required to violate conscience by supporting their own clergy through the instruments of government.

The element of choice in the taxpayers was said to make the establishment nonpreferential and noncoercive. Supporters of the Virginia bill invoked the slogan "Equal Right and Equal Liberty," and argued that "assessment imposed *not 'the smallest coercion'* to contribute to the support of religion." Curry at 145, quoting petitions to the legislature in 1784 and 1785 (emphasis added).

The Maryland bill went even further to eliminate coercion. Each taxpayer could pay his tax to the minister of his choice, or to a fund for the poor. Curry at 155. In addition, any taxpayer who declared "that he

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[2] The bill's reference to "seminaries of learning" meant secular schools. See Buckley at 108-09, 133; Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 897 n.108 (1986).

does not believe in the Christian religion . . . shall not be liable to pay any tax for himself in virtue of this act." *Id.* So no one was forced to support a church, and non-Christians were not forced to support anything. There was a state-created occasion for expressing one's religious dissent and exposing oneself to the social coercion of the community, but that same problem faces Respondent and his daughter in this case.

Both the Maryland and Virginia assessment bills were the subject of great public debate, and each was soundly defeated. The Virginia bill was the occasion for Madison's Memorial and Remonstrance Against Religious Assessments, and for many similar memorials by Presbyterians, Baptists, and other religious dissenters. See Buckley at 113-43; Eckenrode at 103-11.

No one suggested that the problem with these bills was that they had not gone quite far enough toward eliminating coercion. No one suggested a general exemption for all who declined to pay. No one suggested that the state should calculate a fair-share

contribution for each citizen and collect it only from those willing to pay. State assistance to churches was rejected as an establishment, even with the right to designate the recipient of the tax, to pay the tax to secular uses instead of religious ones, and in Maryland, to escape the tax altogether by declaring nonbelief.

What made these bills establishments was not coercion, but state support for religion. Dramatically reducing the coercive elements had not satisfied the opponents of establishment, and no one at the time appears to have thought that entirely eliminating the remnants of coercion would have made any difference. The essence of establishment, then as now, was state support for religion. Reducing or eliminating coercion did not affect the essence of what made these bills establishments.

These debates in the states are directly relevant to the original meaning of the federal Establishment Clause. In sweeping terms, the Constitution prohibits any law respecting an "establishment." "Establishment"

is not defined. Unavoidably, the word would have been understood in light of the recent debates over disestablishment in the states. These debates are the principal evidence of "how the words used in the Constitution would have been understood at the time." Robert Bork, *The Tempting of America* 144 (1990). As Justice Rutledge observed, "the Congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled." *Everson*, 330 U.S. at 42 (dissenting).

This Court's long-standing rule that government may not aid or endorse religion flows directly from the Founding generation's principle that government may not aid or support religion, even by bare endorsements in toothless laws.

B. The Original Meaning of Disestablishment Is Revealed by Debate Over Real Controversies; That Meaning Is Not Changed by Practices That Were Not Seriously Debated.

A second thread to Petitioners' argument is that government prayer must be constitutional because the

Founders did it. Pet. Br. 26-32. The premise of this argument is that anything the Founders did is OK. In fact Petitioners go further: the Constitution permits anything the Founders did and "any other practices with no greater potential for an establishment of religion." *Id.* at 30 n.31, quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., dissenting).

The Court has squarely rejected this argument, and properly so. *Allegheny*, 492 U.S. at 604-05. The argument proves far too much. Equally important, it ignores the political origin of constitutional rights.

Constitutional rights are designed to prevent the recurrence of historic abuses. Eliminating such abuses often requires major political battles. The People create constitutional rights when the winners of one of these political battles believe the issue to be so important, and the danger of regression so great, that the issue must be put beyond reach of the usual political processes.

Because constitutional rights emerge from major controversies, we should not expect to find a consensus

that unites both supporters and opponents of a constitutional provision, or even a fully consistent view of all related issues among the supporters. The winners muster a super-majority for a broad statement of principle, but they do not achieve unanimity or even consensus on either the principle or the details of its application. The attitudes that gave rise to the losing side of the controversy do not instantly disappear, and neither do the abusive practices that made the amendment necessary. Petitioners ignore reality when they propose to remove from the scope of constitutional rights any practices that survived ratification. See Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 Notre Dame J.L. Ethics & Pub. Pol'y 683, 688-91 (1990).

By Petitioners' principle, the Alien and Sedition Acts are an authoritative interpretation of the Free Speech and Press Clauses, de jure segregation of schools in the District of Columbia is an authoritative interpretation of the Equal Protection Clause, and the many devices that led to near total disenfranchisement of black voters for

most of a century are an authoritative interpretation of the Fifteenth Amendment. Moreover, these abuses would become the standard for further interpretation: government could engage in any other practice no more restrictive of constitutional rights than the Alien and Sedition Acts, school segregation, and disenfranchisement of black voters.

Petitioners' principle leads to such absurd consequences because it proceeds backwards. It lets the behavior of government officials control the meaning of the Constitution, when the whole point is for the Constitution to control the behavior of government officials.

The relevant original understanding is not determined by every specific act of the Founders. The nation's "heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause." *Allegheny*, 492 U.S. at 604-05. Rather, as Robert Bork has said, the original understanding of a constitutional clause consists not of a conclusion but of a major premise. The "major premise is

a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action." *Tempting of America* at 162-63.

Another leading originalist has also explained that original intent depends on identifiable principles and not on every unexamined practice of the Founders:

> The insistence on a principle, and not just historical fact, follows from the function of interpretation as enforcing the Constitution as law. If the Constitution is law, it must embody *principles* so that we can ensure that like cases are treated alike, and that those governed by the Constitution can understand what is required of them.

Michael McConnell, *On Reading the Constitution*, 73 Corn. L. Rev. 359, 363 (1988) (emphasis in original).

The basic principle of a constitutional clause is best identified from the controversies that gave rise to it. These controversies were consciously examined under political pressure that made the debate real and not just academic. These controversies identify the core target of the constitutional right. Interpreters can then search for a coherent principle, consistent with the constitutional text and as broad as the text, that centers on the

core problem the text was intended to resolve. See Laycock, 4 Notre Dame J.L. Ethics & Pub. Pol'y at 690.

The religion clauses had two great defining controversies. One was the long Protestant-Catholic conflict in the wake of the Reformation. The other was the battle over disestablishment in the states. These are the contexts in which the Founders thought about the meaning of establishment, and we should look to these controversies to learn what they meant by establishment.

C. Protestant-Catholic Conflict in the Nineteenth Century Revealed the Need to Apply the Neutrality Principle to the Public Schools.

Government prayer and religious proclamations, and the role of religion in public education, were not real controversies in the Founders' time. There were multiple reasons for this lack of controversy, but the most important was simply that the nation was overwhelmingly Protestant, and no significant group of Protestants was victimized by these practices. If a religious practice was not controversial among Protes-

tants, it was not sufficiently controversial to attract political attention.

Theological and liturgical differences among Protestants were large, but for a variety of reasons, these differences appear to have been bridgeable in the rudimentary schools of the time. Most schools were small, and many served a relatively homogenous local population. Some were run by local governments, some by associations of neighbors, some by entrepreneurial teachers, some by churches. Some of these schools defied characterization as public or private. In some urban areas, parents had many choices. The wide variety of schools is described by the historian Carl F. Kaestle in *Pillars of the Republic: Common Schools and American Society 1780-1860* at 13-61 (1983).

Professor Kaestle describes the movement for a more organized system of state-supported schools as growing out of a "Native Protestant ideology" that was comprehensive in its scope, including religious, political, and social reform principles. *Id.* at 75-103. This

ideology naturally incorporated religious instruction into the new common schools. The common school movement attempted to bridge the religious gaps among Americans with an unmistakably Protestant solution: by confining instruction to the most basic concepts of Christianity, and by reading the Bible "without note or comment." The Protestant leaders of the common school movement assumed that no one could object to reading the Bible, and by forbidding teachers to explain the passages read, they thought they had avoided sectarian disagreements about interpretation.

That solution was not entirely satisfactory even among Protestants. Conservative and evangelical Protestants accused Unitarians like Horace Mann of secularizing the public schools; stripped-down, least-common-denominator religion was not acceptable to them. Charles Glenn, *The Myth of the Common School* 131-32, 179-96 (1988); see also Kaestle at 98-99. One spokesman for the critics charged Horace Mann's Massachusetts schools of teaching "nothing more than Deism,

bald and blank." Matthew Hale Smith, quoted in Glenn at 189. But Protestants largely abandoned their disagreements to unite against the wave of Catholic immigration in the mid-nineteenth century. Glenn at 179; Kaestle at 98.

Catholics fundamentally challenged what seemed to them Protestant religious instruction in the public schools. Glenn at 196-204; Diane Ravitch, *The Great School Wars* 3-76 (1974). For one thing, Catholics used the Douay translation of the Bible, and objected to reading the King James translation, which they called "the Protestant Bible."

More important, Catholics condemned the "solution" of reading the Bible without note or comment as a fundamentally Protestant practice. Glenn at 199; Ravitch at 45. Protestants taught the primary authority of scripture and the accessibility of scripture to every human. Catholics taught that scripture must be understood in light of centuries of accumulated church teaching. For Catholic children to read the Bible

without note or comment was to risk misunderstanding. Protestant practices were being forced on Catholic children.

The controversy over the Protestant Bible in public schools produced mob violence and church burnings in Eastern cities. Kaestle at 170; Ravitch at 36, 66, 75; 1 Stokes at 830-31. The resulting controversies were major political issues for decades. The anti-Catholic, anti-immigrant Know Nothing Party swept elections in eight states in the 1850s. 1 Stokes at 836-37. Among other things, these issues gave rise to the proposed Blaine amendment to the Constitution, which would have codified the Protestant position by permitting Bible reading but forbidding "sectarian" instruction in any publicly-funded school. This amendment was defeated by Democrats in the Senate. 2 Stokes at 68-69. In Senator Blaine's subsequent campaign for the Presidency, these issues gave rise to one of the most famous gaffes in American politics, the jibe that Democrats were "the party of Rum, Romanism, and Rebellion." Arthur Schle-

singer, ed., *History of American Presidential Elections 1789-1968* at 1606 (1971).

Thus, in the wake of Catholic immigration, religion in the public schools produced exactly the sort of violent religious confrontation the Founders had sought to avoid. Religion in schools initially had been a nonproblem that raised no concern. Under changed social conditions, religion in schools became a serious violation of the disestablishment principle, which inflicted precisely "those consequences which the Framers deeply feared." *Abington School District v. Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring). The principle of disestablishment did not change, but the nation was forced to confront a previously ignored application of the principle. Just as government could not endorse religion in statutes or state constitutions, neither could it endorse religion in public schools.

The first cases forbidding religious observances in public schools date from the latter part of this period. *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W.

967 (1890) (mandamus against Bible reading); *Board of Education v. Minor*, 23 Ohio St. 211 (1872) (upholding and defending school board's decision to eliminate Bible reading and hymns). On the other hand, some schools whipped or expelled Catholic children who refused to participate in Protestant observances, and some courts upheld such actions. *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Boston Police Ct. 1859); Kaestle at 171; 1 Stokes at 829. Neither side drew the line between coercion and noncoercion. Those who understood the grievance of religious minorities abandoned the offending practice; those who saw no grievance saw no reason not to coerce compliance.

The dispute over the Protestant Bible revealed the impossibility of conducting "neutral" religious observances even among diverse groups of Christians. Protestant education leaders did not set out to victimize Catholics; they genuinely thought that reading the Bible without note or comment was fair to all and harmful to none. What seemed harmless from their perspective was not

harmless when applied across the full range of American pluralism.

Today, the range of religious pluralism in America is vastly greater. Immigration has brought Jews, Muslims, Buddhists, Hindus, Sikhs, Taoists, animists, and many others. Significant numbers of atheists and agnostics have been with us since the late nineteenth century; they were little more than a theoretical possibility to the Founders. See James Turner, *Without God, Without Creed: The Origins of Unbelief in America* (1985). The possibility of "neutral" religious observance remains a fiction.

III. This Court Has Repeatedly and Continuously Rejected a Coercion Test from Its Earliest Consideration of the Issue.

Petitioners acknowledge that their new rule would require modification of the familiar test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But their proposal is far more radical than that. Their attack reaches to the very core of the *Lemon* test -- to the proposition that govern-

ment conduct should not have the primary effect of either advancing or inhibiting religion.

This language did not originate in *Lemon*. The familiar three-part *Lemon* test is simply a convenient formulation of "the cumulative criteria developed by the Court over many years." 403 U.S. at 612. The third prong, excessive entanglement, came from *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). The first two prongs -- the prongs that draw Petitioners' principal attack -- came verbatim from one of the school prayer cases, *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).

The *Schempp-Lemon* formulation was simply an elaboration of the fundamental rule that government must be neutral with respect to religion. *See Schempp* at 222. The Court stated that rule in global terms in its first modern establishment clause decision: the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Everson*, 330 U.S. at 18.

The United States says simply that "The problem is *Lemon*." U.S. Br. at 20. But the government's "problem" is not *Lemon*. The government's problem is the whole history of establishment clause jurisprudence in this Court. This Court rejected Petitioners' proposed coercion test at its first opportunity and at every opportunity since. A majority of a full Court firmly and explicitly rejected it just two years ago. *Allegheny*, 492 U.S. 573. Petitioners do not even acknowledge *Allegheny*'s existence. The single authority most cited in the argument portion of their brief is the *dissent* in *Allegheny*. Pet. Br. 9, 12, 30, 35, 36, 37, 38, 41, 43, 44. Their second most cited authority is the *dissent* in *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987). Pet. Br. 14, 19, 20, 25, 28, 37, 38, 43. And even the dissent in *Allegheny* does not support Petitioners' position. See *infra* 57-58.

This Court has never suggested that government may comply with the Establishment Clause merely by refraining from coercion. It is true that many opinions have

mentioned the evil of coercing persons to participate in religious observances. That is the most egregious case of establishment, and any form of government support for religion readily slides into coercion by imperceptible degrees. But contrary to Petitioners' claim, the Court's early opinions did not distinguish coercion from mere government persuasion, condemning one and approving the other. Rather, the early opinions treated coercion and government persuasion interchangeably, condemning either as unconstitutional.

Justice Black wrote for the majority in *Everson*:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force *nor influence* a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion.

330 U.S. at 15 (emphasis added). This passage treats force and influence in matters of religion as equally objectionable. It treats aid to religion as the essence of establishment. And the Court certainly did not suppose

that government could "set up a church" if no one were coerced to support it.

Justice Rutledge for the four dissenters in *Everson* was even more explicit about noncoercive violations of the Establishment Clause. He listed coercive violations of the Establishment Clause, and he contrasted these with "the serious surviving threat[s]" of financial aid to religious institutions and "*efforts to inject religious training or exercises and sectarian issues into the public schools.*" 330 U.S. at 44 (Rutledge, J., dissenting) (emphasis added). Thus, none of the nine Justices in *Everson* believed that coercion was an element of every establishment clause violation.

The Court again equated coercion and persuasion in *Zorach v. Clausen*, 343 U.S. 306 (1952), upholding programs under which schools released students to attend private religious instruction. The Court said:

> . . . if it were established that any one or more teachers were using their office *to persuade* or force students to take the religious instruction, a wholly different case would be presented.

Id. at 311. The Court distinguished the released time program in *Zorach* from the similar program in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), on grounds that had nothing to do with coercion. The charge of coercion in both cases rested on the claim that limiting students to study hall or religious instruction coerced them to choose religious instruction. 343 U.S. at 309-10. *Zorach* rejected that claim, finding neither coercion nor persuasion. Thus, *Zorach*'s explanation of *McCollum*, essential to the holding in both cases, is that there was no coercion in *McCollum*, but there was an establishment clause violation in *McCollum* -- necessarily an establishment clause violation without coercion. This coercion-free violation was adjudicated in 1948.

The Court distinguished the cases on the ground that religious instruction was off campus in *Zorach*, but on campus in *McCollum*. 343 U.S. at 309. The key to an establishment clause violation was not coercion, but use of school property. Justice Brennan believed that the

use of school property mattered because it augmented the persuasive powers of the religious teachers:

> To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But *the Constitution does not permit that prestige and capacity for influence to be augmented* by the investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

Schempp, 374 U.S. at 263 (Brennan, J., concurring) (emphasis added).

In *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court quoted *Everson*'s explanation of establishment, permitting "neither force nor influence," *id.* at 443, and it quoted and italicized Justice Rutledge's identification of religious exercises in public schools as a noncoercive threat to disestablishment, *id.* at 444 n.18.

Thus it was no innovation when the Court squarely rejected a coercion test in the first school prayer case. *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962). Nor did the Court announce a distinction between direct and indirect coercion, as the United States suggests. U.S. Br.

at 19 n.18. The Court said that the Establishment Clause went far beyond even indirect coercion:

> When the power, *prestige* and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. *But the purposes underlying the Establishment Clause go much further than that.* Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.

Engel, 370 U.S. at 431 (emphasis added).

The language elsewhere in the opinion confirms the depth of the Court's belief that coercion is no essential part of establishment clause analysis. It was unconstitutional for New York "to *encourage* recitation of the Regents' prayer," *id.* at 424, to place "its official stamp of *approval*" on any religion, *id.* at 429, or to use its "*prestige*" to "*support or influence* the kinds of prayer the American people can say," *id.* (all emphases added).

The Court reaffirmed its commitment to government neutrality toward religion in the second school prayer case, *Abington School District v. Schempp*, 374 U.S. 203, 215, 218, 222, 225-26 (1963). The Court said that the

purpose of the First Amendment was "to take *every form of propagation of religion* out of the realm of things which could directly or indirectly be made public business . . ." *Id.* at 216, quoting *Everson*, 330 U.S. at 26 (Jackson, J., dissenting) (emphasis added). And the Court said, the state cannot "perform or *aid in performing the religious function.*" 374 U.S. at 219, quoting *Everson*, 330 U.S. at 52 (Rutledge, J., dissenting) (emphasis added).

The Court first quoted the entirety of *Engel*'s holding that coercion is not an element of an establishment clause violation, 374 U.S. at 221, and then for emphasis paraphrased it more succinctly, *id.* at 223. And elaborating on "the wholesome 'neutrality' of which this Court's cases speak," the Court formulated what became the first two prongs of the *Lemon* test: "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222.

Justice Stewart in dissent suggested that coercion should be the key, *id.* at 316-20, so the issue was

squarely presented. He attracted no vote but his own. But his sensitive understanding of coercion makes clear that he would find coercion here. He recognized the dangers of "psychological compulsion to participate," *id.* at 318, and he thought it would be coercive if students who failed to attend religious exercises had to forgo "the morning announcements." *Id.* at 320 n.8. Graduation is a far more important event than morning announcements; if requiring students to miss the morning announcements is coercive, a fortiori requiring them to miss their graduation is coercive. All nine Justices in *Schempp* rejected Petitioners' position here.

The Court applied the *Schempp* test in *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968), and reaffirmed the government's duty to "be neutral in matters of religious theory, doctrine, and practice." *Id.* at 103-04.

Then began the long series of cases on financial aid to religious institutions. The two-part *Schempp* test was incorporated into the three-part *Lemon* test, and that test was quoted and applied in case after case.

More relevant here are the cases on government-sponsored religious observances. In cases arising in the public schools, this Court has struck down every such observance it has considered. In *Stone v. Graham*, 449 U.S. 39 (1980), Kentucky posted the Ten Commandments on the walls of schoolrooms. If ever it were plausible to say there is no coercion in a school case, *Stone* would have been the case. But the Court summarily invalidated the Kentucky practice, citing state "auspices" and "official support" for religion as unconstitutional. *Id.* at 42, quoting *Schempp*, 374 U.S. at 222.

Two years later, the Court unanimously invalidated a statute that authorized students and teachers to volunteer to lead the class in prayer. *Karen B. v. Treen*, 653 F.2d 897, 899 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982). The statute ineffectually provided that "no student or teacher could be compelled to pray," but that did not save the statute or even require full argument.

The following term the Court decided *Marsh v. Chambers*, 463 U.S. 783 (1983), upholding prayer in the

Nebraska legislature. Chief Justice Burger wrote a narrow opinion, relying on the "unique history" of legislative prayer, *id.* at 791, and the fact that the person claiming injury was an adult, *id.* at 792. The Court announced no new standard, and it did not question the general rule of government neutrality toward religion. In the same term, another opinion by Chief Justice Burger quoted and reaffirmed the *Schempp-Lemon* test, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982), and condemned a "symbolic benefit" to religion, *id.* at 125. Eight justices joined this opinion.

The following Term showed that *Marsh* did not apply to schools, and perhaps did not apply to anything other than the "unique" case of legislative prayer. The Court unanimously affirmed invalidation of a statute authorizing public school teachers to lead willing students in prayer. *Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd mem.*, 466 U.S. 924 (1984). And all nine Justices applied the *Schempp-Lemon* test to the municipal Christmas display in *Lynch v. Donnelly*,

465 U.S. 668 (1984). The majority found the display sufficiently secular to justify a finding of secular purpose and effect, *id.* at 681-82; the dissenters disagreed.

It was in this case that Justice O'Connor offered her endorsement test to clarify the first two prongs of the *Lemon* test. *Id.* at 690. The Court incorporated Justice O'Connor's endorsement test into its analysis the following year in *Wallace v. Jaffree*, 472 U.S. 38 (1985). The Court quoted and applied the *Schempp-Lemon* test, but it also accepted the endorsement test as an authoritative elaboration:

> "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."

Id. at 56 n.42, quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). For similar statements by the Court, see *Wallace*, 472 U.S. at 58 n.45, 59, 61 & n.52. *Wallace* was also the occasion for Justice Powell's

emphatic defense of the *Lemon* test as the settled law of this Court. *Id.* at 63 & n.5 (Powell, J., concurring).

The endorsement test was so readily assimilated to the *Schempp-Lemon* test in this context because government-sponsored religious observances rarely present the ambiguities that the endorsement test was designed to clarify. Endorsement is a helpful way of explaining that it is not a forbidden benefit to religion to exempt conscientious objectors or otherwise remove burdens from religious practice. *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring). In the context of religious observances, which do not remove burdens and rarely have plausible secular purposes, it was immediately clear that the endorsement test and the *Schempp-Lemon* test were compatible.

Two years later, in *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court again applied the *Schempp-Lemon* test, *id.* at 582-83, as clarified by the endorsement test, *id.* at 585, to strike down a statute requiring balanced treatment of evolution and "creation science." The Court

noted that *Marsh v. Chambers* had been the only case in which the Court failed to apply the *Schempp-Lemon* test. *Id.* at 583 n.4.

Most recently, the Court applied the *Schempp-Lemon* test, as clarified by the endorsement test, to prohibit display of a creche in a county courthouse. *Allegheny*, 492 U.S. at 592. The Court did not say that the display was coercive; rather, it said that the display "has the effect of *endorsing* a patently Christian message." *Id.* at 601 (emphasis added).

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principal remains the same. The Establishment Clause, at the very least, prohibits government from *appearing to take a position* on questions of religious belief . . .

Id. at 593-94 (emphasis added). The Court explained *Lynch v. Donnelly* as holding "that government may celebrate Christmas in some manner and form, but not in a way that *endorses* Christian doctrine." *Id.* at 601 (emphasis added).

Justice Kennedy's dissent proposed a fundamentally different standard: that "government may not coerce

anyone to support or participate in any religion or its exercise," *id.* at 659, and that government may not "proselytize on behalf of a particular religion," *id.* at 661.

The majority emphatically rejected this standard: *"Justice Kennedy's reading of Marsh would gut the core of the Establishment Clause, as this Court understands it."* *Id.* at 604. And, the Court might have added, as this Court has long and all but unanimously understood it. The *Schempp* test was adopted eight to one, and the dissenter, Justice Stewart, understood coercion much more expansively than Petitioners here. The *Lemon* test was adopted seven to one -- eight to one with Justice Brennan's concurrence. The dissenter, Justice White, has never voted to uphold school-sponsored religious observances in a public elementary or secondary school.

The opinions just reviewed, committing the government to neutrality between religion and nonreligion, and forbidding government persuasion or influence in religious matters, have been joined by nearly every Justice appointed since the issues first reached this

Court: by Chief Justices Vinson, Warren, and Burger, by Justices Black, Reed (in *Everson* although not in *McCollum*), Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton, Clark, Minton, Harlan, Stewart (in *Lemon* although not in *Schempp*), Brennan, White (in *Wallace, Stone, Epperson*, and *Schempp*, although not in *Lemon*), Goldberg, Fortas, Marshall, Blackmun, Powell, Stevens, and O'Connor. "It is not right -- it is not constitutionally healthy -- that this Court should feel authorized to refashion anew our civil society's relationship with religion . . ." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 45 (1989) (Scalia, J., dissenting).

IV. Government Sponsorship Corrupts Religion and Promotes Least-Common-Denominator Faith and Liturgy.

Petitioners and the United States would have the Court assume that only nonbelievers are hurt by the practices at issue here. Even if that were true, it would be irrelevant; nonbelievers have constitutional rights too.

More relevant to these amici, it is not true. Government-sponsored religious observances hurt believers as well as nonbelievers. Such observances hurt all religions by imposing government's preferred form of religion on public occasions. It is not possible for government to sponsor a generic prayer; government inevitably sponsors a particular form of prayer. Whatever form government chooses, it imposes that form on all believers who would prefer a different form.

In some communities, government-sponsored prayer unabashedly follows the liturgy of the locally dominant faith in the community. See, e.g., *Jager v. Douglas County School District*, 862 F.2d 824, 826 (11th Cir. 1989) (frequent references to Christ); *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038, 1039 (5th Cir. 1982) (evangelical Protestant school assemblies). "Sensitive" communities such as Providence attempt to delete from public prayer all indicia of any particular faith, leaving only the least common denominator of majoritarian religion. But these stripped-down

prayers to an anonymous deity are as much a particular form of prayer as any other prayer.

The school teachers who plan the ceremony decide what prayers are acceptable and what not, and what clergy are acceptable and what not. In this process, the schools establish a religion of mushy ecumenism. The clergy for these prayers are determined by the limits of acceptability to the mainstream. In Providence and many other cities, the guidelines for this prayer are supplied by the National Conference of Christians and Jews. The NCCJ's guidelines implement its commitment to minimizing religious and ethnic conflict. The guidelines emphasize "inclusiveness and sensitivity," and they offer a specific list of "universal, inclusive terms for deity." J.A. 21. Government adoption of these guidelines establishes an uncodified but generally accepted book of common prayer.

This least-common-denominator strategy is the same strategy followed by the Protestant school reformers of the nineteenth century, and it fails for similar reasons.

By removing from religious observance all those things on which different faiths disagree, the school is left with an abstract impersonal God that nearly all faiths reject. What is left is unacceptable to many believers who take their own faith seriously.

The problem is as fundamental and intractable as the question of Whom to pray to. To pray to or in the name of Christ is a blasphemy to most Jews; not to do so is theologically and liturgically incorrect to most Christians. Is it better to silently affront the Christian majority by leaving Christ out of prayer, or to overtly offend the Jewish minority by praying in Christ's name? Given the sad history of Christian-Jewish relations, leaving Christ out is probably the lesser of the evils. This Court has said that leaving Christ out is constitutionally required. *Allegheny*, 492 U.S. at 603. But leaving Christ out of prayer is not a solution; it is at the core of the problem.

Whichever choice government makes, it endorses that choice. Government-sponsored prayer on public oc-

casions lends the weight of government practice to a preferred form of prayer. By their example, schools that leave Christ out of prayer endorse that practice as more tolerant, as more enlightened, as government approved. They lend the authority of government to a desacralized, watered-down religion that demands little of its adherents and offers them little in return.

The attempt to be inclusive amplifies the message of exclusion to those left out. Because such prayers are carefully orchestrated not to offend anyone who counts in the community, the message to those who are offended is that they do *not* count -- that they are not important enough to avoid offending. The message is:

> We go out of our way to avoid offending people we care about, but we don't mind offending you. If you have a problem with this, you are too marginal to care about. This is our graduation, not yours.

It is not just nonbelievers who may be offended or excluded by the prayers in this case. These prayers also exclude serious particularistic believers, those who take their own form of prayer seriously enough that they do

not want to participate in someone else's form of prayer. There are still millions of Americans who believe that all religions are not equal, that their own religion is better, or even that their own religion is the one true faith, and that their faith should not be conglomerated into something that will not offend the great majority.

Those who would not pray at all, those who would pray only in private, those who would pray only after ritual purification, those who would pray only to Jesus, or Mary, or some other intermediary, those who would pray in Hebrew, or Arabic, or some other sacred tongue, are all excluded or offended by the prayers in this case. Those who object to the political or theological content of these prayers are similarly excluded -- those whose vision of God is not the government's vision, those whose concept of God does not track the National Anthem, whose God is not "the God of the Free and Hope of the Brave," but perhaps the God of the oppressed and the Hope of the fearful.

On occasion, religious observances in public schools still produce ugly confrontations between those who object to least-common-denominator prayer and those who support it. A detailed account of such an incident appears in *Walter v. West Virginia Board of Education*, 610 F. Supp. 1169, 1172-73 (S.D. W. Va. 1985), where an eleven-year old Jewish child was condemned as a Christ killer because he did not appear to pray during a moment of silence. Most contemporary religious dissenters in public schools suffer in silence, and we have had no recent repetitions of the mob violence of the nineteenth century. But reduction of violence is not a reason to relax constitutional protections. Religious dissenters should not have to provoke violence to call attention to their constitutional rights.

The political content of the prayer in this case illustrates another core danger of established religion. When government sponsors religious observances, it appropriates religion to its own uses and unites religious and governmental authority. The message of Rabbi

Gutterman's invocation is an essentially political message -- that American government is good, that freedom is secure, that courts protect minority rights, that America is the land of the free and the home of the brave, etc. See J.A. 22.

The invocation's political message is popular but not uncontroversial. The school can deliver that political message if it chooses. The rabbi can deliver that message if he chooses. But the school and the rabbi cannot unite the authority and prestige of church and state in support of that message. The school cannot recruit a rabbi to wrap that political message in religious authority. The school cannot misappropriate the authority of the church to prop up the authority of the state.

It is a common observation that religion has thrived in America without an establishment, and declined in Western Europe with an establishment. It is less commonly observed that the established churches of colonial America declined in numbers and influence,

while the dissenting sects who insisted on rigorous disestablishment grew and flourished.

These long term religious trends reflect the baleful effects of government sponsorship. Religion does not benefit from public prayer that "degenerates into a scanty attendance, and a tiresome formality." *Cf.* Pet. Br. 32 n.33, quoting Madison's description of prayer in the early Congress. Government sponsorship of religion is always clumsy, and usually motivated more by political concerns than religious ones. In intolerant communities it tends inevitably toward persecution; in tolerant communities it tends inevitably toward desacralization. One function of the Establishment Clause is to avoid this dilemma.

V. For Reasons That Parallel the Analysis of Coercion, Government Proselytizing Is Not an Element of an Establishment Clause Violation.

In a recent dissent, Justice Kennedy proposed that the Establishment Clause might be satisfied if government refrained either from coercion or from proselytiz-

ing. *Allegheny*, 492 U.S. at 659, 661. The Court squarely rejected the proselytizing test, *id.* at 602-13, and neither Petitioners nor the United States has urged it here. Petitioners apparently believe that government may proselytize so long as it does not coerce. Even so, it seems prudent to briefly consider the proselytizing half of the rejected test.

With respect, these amici have only the vaguest idea which endorsements of religion would count as proselytizing. Apparently, proselytizing is a matter of degree. Some government endorsements of religion would be permitted, but persistent endorsements would be forbidden proselytizing, *id.* at 661 (Kennedy, J., dissenting), and presumably insistent endorsements or explicit calls to conversion would be forbidden proselytizing.

Much prayer would be proselytizing, which may be why Petitioners do not urge the proselytizing test. Prayers are an important, powerful, and frequent means of proselytizing. Evangelists lead their audience in prayer; proselytizers pray privately with individuals. No

one would doubt the proselytizing intent of a pastor at commencement who prayed "that the Holy Spirit pass through this class, and touch every heart, and lead these graduates to Jesus." There are endless variations of proselytizing more subtle than this example. Unless courts and school boards are to parse the content of prayers, the only way to avoid proselytizing at commencement is to avoid prayer at commencement.

More fundamentally, the proselytizing test violates the Establishment Clause for most of the same reasons a coercion test would violate the Establishment Clause. First, the proselytizing test is inconsistent with the original meaning of the clause. The bare endorsements of the South Carolina Constitution and the Virginia Episcopal incorporation act presumably did not amount to proselytizing, but they were establishments in the understanding of the founding generation.

Second, the proselytizing test is inconsistent with historical applications of the original principal. Reading the Bible "without note or comment" was an attempt to

avoid proselytizing as well as sectarian division. But as shown above at 27-30, this program was the source of bitter religious strife. Religious observances in the public schools, with or without overt proselytizing, led to the very evils the Establishment Clause was designed to prevent.

Third, the proselytizing test is inconsistent with this Court's precedents. From the beginning, this Court has properly insisted that government be neutral toward religion. Government was not to refrain merely from coercion, or from proselytizing, but from "persuasion," from "influence," from any "stamp of approval," from any departure from "neutrality." See 32-48 *supra*.

Fourth, government-sponsored religious observances inflict the same harms on religion whether or not government proselytizes. The vagueness of a proselytizing test may steer some governmental units away from the specific liturgy of any particular faith, but this will only reinforce the tendency to desacralization. There is no avoiding the central dilemma: when government

conducts religious rituals, it must conduct them in some concrete form, and whatever form it chooses is endorsed and tendered to the community as a model. For all these reasons, the proselytizing test is an inadequate protection for religious liberty.

VI. The Prayers and Practice at Issue in This Case Violate Both the Neutrality Standard and Any Plausible Coercion Standard.

Some of the amici joining in this brief believe that the harmful effects of government-sponsored religious observances inhere in any such observance, and that all such observances are unconstitutional. Others of the amici joining in this brief believe that some such observances are permitted, because in some cases, the effects of government endorsement are so attenuated that any advancement or inhibition of religion is not constitutionally significant.

This case does not require amici to resolve that disagreement, and it does not require the Court to draw fine lines. The religious practices in this case plainly

violate any version of the neutrality test; they even violate Petitioners' proposed coercion test.

An essential feature of this case is a captive audience of young children. It is not merely that children are in attendance, or that children want to be in attendance. It is also that the event is planned especially for children, to honor children on one of the major accomplishments of their young lives. Providence says to its high school graduates, and to its middle school promotees: if you wish to be honored on your promotion, you must first be "compelled to listen to the prayers" of others. *Cf. Wallace*, 472 U.S. at 72 (O'Connor, J., concurring).

As Respondent effectively shows, the children have no realistic choice but to sit through the prayers attentively and respectfully. They must give every outward appearance of joining in the prayers. This is not like a passive display, where people can "turn their backs." *Cf. Allegheny*, 492 U.S. at 664 (Kennedy, J., dissenting). Nor is it like a legislature, where adults come and go at will,

and can avoid the invocation by the simple expedient of arriving late.

Petitioners seem to assume there is no coercion unless children are compelled to *believe in* the religious premises of the prayers. See Pet. Br. 41 (heading 3). But that is absurd. That standard would permit the state to compel church attendance, or any other religious behavior. It is impossible to compel belief; outward manifestations of belief are all that the state can ever hope to compel. When the state compels children to give respectful attention to prayers, it has violated even the coercion test.

The prayers in this case are also especially problematic because of the state's role in planning and supervising the content of the prayers. School teachers plan the ceremony. They decide whether to include prayers, how many prayers, and at what point. They select the clergy to offer the prayers. They give the clergy "guidelines" to acceptable prayer. They call to make sure the clergy understand the guidelines. J.A. 12-13. Par-

ticipating clergy cannot avoid the inference that they are unlikely to be invited again if they depart from the guidelines. Government and religion are hopelessly entangled in this process. Just as "it is no part of the business of government to compose official prayers," *Engel*, 370 U.S. at 425, so it is no part of the business of government to prescribe official guidelines for prayer.

The teachers' central role in planning and supervising these prayers negates any claim that the clergyman they select is simply a private speaker. This case is wholly unlike *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990), where there was no school sponsorship and a wholly voluntary audience. It is wholly unlike religious imagery in a commencement address by Martin Luther King, where a prominent public figure was invited to speak on any topic of his choice. *Cf.* Pet. Br. 8. Here, carefully selected clergy are invited solely to pray, at times designated by the school and in accordance with liturgical guidelines imposed by the school.[3]

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[3] Religious amici supporting Petitioners do so principally on the implausible theory that these prayers

This is not a free speech case or an equal access case. It is a school prayer case, plain and simple. In terms of school sponsorship, government entanglement, and coercion of children, this case is indistinguishable from *Engel* and *Schempp*. It differs from those cases only in the frequency of the constitutional violation. If this Court holds that school prayer is permitted occasionally but not daily, it will be faced with a long series of cases asking how often is too often, and which occasions are special enough. If commencement is exempt from the school prayer cases, what about holidays, student assemblies, athletic events, pep rallies, and any other day on which an "occasion" can be identified?

School-sponsored and school-supervised prayer is not the only way to take religious note of graduation. A private baccalaureate service, sponsored by the local

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were somehow an exercise of private free speech in a public forum. Christian Legal Society Br. 4-21; Rutherford Institute Br. 3-18; U.S. Catholic Conf. Br. 4-28. Few if any religious leaders are willing to defend government direction of religious observances.

association of churches and synagogues, is the obvious constitutional alternative. Unsponsored student groups exercising their rights under *Mergens* might organize religious observances of the occasion. Either of these alternatives would leave religious worship in religious hands, either would avoid coercion of young children, and either would avoid government sponsorship.

Conclusion

The judgment below should be affirmed. This Court's settled rule that government must be neutral toward religion should be reaffirmed.

Respectfully submitted,

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APPENDICES

INTERESTS OF THE INDIVIDUAL AMICI CURIAE

APPENDIX A

INTERESTS OF THE AMICI

The American Jewish Committee ("AJC"), a national organization founded in 1906, is dedicated to the defense of religious rights and freedoms of all Americans. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society. In support of this vital principle, AJC through the years has filed numerous briefs in the Court. We do so again in the conviction that religious observances of any kind do not belong in public schools.

* * *

The American Jewish Congress is an organization of American Jews dedicated to the preservation of the political, civil, economic and religious rights of American Jews and, indeed, all Americans. To this end, it has filed numerous briefs in this and other courts in cases implicating the religion clauses of the First Amendment.

— The American Jewish Congress believes that religious ceremonies of whatever kind have no place in the nation's public schools. It believes that the ceremony at issue here amounted to a compulsory church service incompatible with the Establishment Clause of the First Amendment.

• • •

James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods.

This brief is consistent with the polices adopted by the General Assembly regarding the Establishment Clause of the First Amendment. The 200th General Assembly of the Presbyterian Church (U.S.A.) squarely addressed this issue in 1988:

> We believe that the establishment clause requires government to be wholly neutral in matters of religion. Government may not require adher-

> ence to a particular religious belief, designate an official state church, or endorse a religion. Government may not sponsor religious observances or grant financial aid to religion. Nor may government support religion in some generic fashion that is allegedly nonpreferential. No support of religion could be nonpreferential in a society as religiously diverse as ours. At best the government would support a broad group of somewhat similar majority religions, with the inevitable result that nonbelievers and members of religious minorities are excluded. Actual or symbolic exclusion of such minorities is inconsistent with one great purpose of the establishment clause: to affirm that every individual can be a full member of the civil polity whatever his or her religious belief.

God Alone Is Lord of the Conscience, A Policy Statement Adopted by the General Assembly (1988) Presbyterian Church (U.S.A.) 7-8.

The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

• • •

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, ADL has previously filed as friend-of-the-court in numerous cases dealing with prayer and religious activities in public school settings, see, e.g., *Mergens v. Board of Education*, 110 S.Ct. 2356 (1990); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); and *Abington v. Schempp*, 374 U.S. 203 (1963). The League believes such activities in public schools pose serious questions concerning government support for or endorsement of

religion in contravention of the establishment clause of the First Amendment.

As a national organization dedicated to safeguarding all persons' religious freedoms, the Anti-Defamation League joins the accompanying brief because we believe the rights of minority religions are no less at stake in the establishment clause cases than in free exercise cases. History has demonstrated that the inevitable result of a union of government and religion is the destruction of freedom for those who believe differently from the majority. ADL, therefore, has consistently advocated a strict interpretation of the establishment clause, in order to protect "our remarkable and precious religious diversity as a nation." *Lynch v. Donnelly*, 103 S.Ct. 1355, 1371 (Brennan, J., dissenting).

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The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States and deals exclusively with issues pertaining

to religious liberty and church-state separation. These organizations include: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various conventions and associations. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists. (It should be noted that the Christian Life Commission of the Southern Baptist Convention has filed an amicus brief in support of Petitioners.) Although the Baptist Joint Committee believes the principle of governmental neutrality embodied in *Lemon* should be preserved and that the instant prayers violate that standard, we do not hereby contest the constitutionality of public ceremonial prayer in general.

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The Committee for Public Education and Religious Liberty (PEARL), founded in 1966, is a coalition of organizations and individuals committed to the preservation of the dual principle of the separation of church and state and the free exercise of religion, as they relate to or affect education in the State of New York. To effectuate its purpose PEARL has instituted suits, submitted briefs amicus curiae, testified before federal and state legislative and administrative bodies and engaged in general educational programs for the community. Members of PEARL participating in this brief are listed in Appendix C.

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The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, which has more than 6.6 million members worldwide, including 760,000 in the United States.

The Church believes that the freedom of conscience includes the right to worship or not to worship, and to profess, practice, and promulgate religious beliefs or to change them. In exercising these rights, however, it admonishes that government should respect the rights of all citizens, not just those of the majority.

The Church has historically maintained that religious liberty is best exercised when church and state are separate.

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The National Council of Churches of Christ in the U.S.A. is a community of thirty-two Protestant and Eastern Orthodox communions having an aggregate membership in the U.S. of over forty million. Its positions on public issues are taken on the basis of policies developed by its General Board, composed of some two hundred and fifty members selected by its member communions in proportion to their size and support of the Council.

Since 1963, the National Council of Churches has supported the decisions of this Court holding state-sponsored prayer in public schools to be violative of the Establishment Clause of the First Amendment, and it has been active in resisting seven successive efforts to amend the Constitution to reverse those decisions. It has also supported the Equal Access Act, which provides that students in public secondary schools may participate in student-initiated and student-led extracurricular activities that may involve religious speech.

The National Council's policies on these matters, however, contemplate that there may be special occasions when prayer may be appropriate in public schools, and that that determination should be left to public school authorities. Since commencement exercises may be such special occasions -- of an infrequent and noncurricular nature -- amicus National Council of Churches does not express a view concerning the constitutionality of the practice at issue in this case. Its sole purpose in joining this brief amici curiae is to

oppose the proposal of the Solicitor General that the long-accepted *Lemon* test of establishment be abandoned for a low-threshold "coercion" test that would render its scope indistinguishable from that of the Free Exercise Clause.

* * *

The National Jewish Community Relations Council (NJCRAC) is an umbrella organization consisting of the following national member organizations: American Jewish Committee, American Jewish Congress, B'Nai B'rith, Anti-Defamation League of B'Nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the United States of America, National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America, Women's League for Conservative Judaism, Women's American ORT; as well as 117 community member agencies representing all major Jewish communities in the United States, listed in Appendix B. As the national planning

and coordinating body for the field of Jewish community relations, dedicated to preserving the principles embodied in the Bill of Rights, the NJCRAC believes that the separation of church and state is an essential bulwark in maintaining the individual, group, and political equality of all Americans.

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People for the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms and religious liberty. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 290,000 members nationwide.

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The Union of American Hebrew Congregations (UAHC) representing 850 synagogues with a membership of 1.5 million Reform Jews throughout the United States and Canada has, from its inception 120 years ago,

been deeply committed to the principle of religious liberty and freedom. Through its member congregations, the UAHC works in communities across the United States to ensure through the strengthening of the separation of church and state that religious freedom for all would never be abridged.

APPENDIX B

MEMBER ORGANIZATIONS OF THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

Birmingham JCC

Greater Phoenix Jewish Federation

Tucson Jewish Federation of Southern Arizona

Greater Long Beach and West Orange County Jewish Community Federation

Los Angeles CRC of Jewish Federation-Council

Oakland Greater East Bay JCRC

Orange County Jewish Federation

Sacramento JCRC

San Diego CRC of United Jewish Federation

San Francisco JCRC

Greater San Jose JCRC

Greater Bridgeport Jewish Federation

Greater Danbury CRC of Jewish Federation

Eastern Connecticut Jewish Federation

Greater Hartford CRC of Jewish Federation

New Haven Jewish Federation

Greater Norwalk Jewish Federation

Stamford United Jewish Federation

Waterbury Jewish Federation

JCRC of Connecticut

Wilmington Jewish Federation of Delaware

Greater Washington JCC

South Broward Jewish Federation

Greater Fort Lauderdale Jewish Federation

Jacksonville Jewish Federation

Greater Miami Jewish Federation

Greater Orlando Jewish Federation

Palm Beach County Jewish Federation

Pinellas County Jewish Federation

Sarasota-Manatee Jewish Federation

South County Jewish Federation

Atlanta Jewish Federation

Savannah Jewish Council

Metropolitan Chicago JCRC of the Jewish United Fund

Peoria Jewish Federation

Springfield Jewish Federation

Indianapolis JCRC

South Bend Jewish Federation of St. Joseph Valley

JCRC of Indiana

Greater Des Moines Jewish Federation

Lexington Central Kentucky Jewish Federation

Louisville Jewish Community Federation

Greater Baton Rouge Jewish Federation

Greater New Orleans Jewish Federation

Shreveport Jewish Federation

Portland Southern Maine Jewish Federation-Community Council

Baltimore JCRC

Greater Boston JCRC

Marblehead North Shore Jewish Federation

Greater New Bedford Jewish Federation

Springfield Jewish Federation

Worcester Jewish Federation

Metropolitan Detroit JCC

Flint Jewish Federation

Minneapolis Minnesota and Dakotas JCRC-
Anti-Defamation League

Greater Kansas City Jewish Community Relations
Bureau

St. Louis JCRC

Omaha JCR Committee of Jewish Federation

Atlantic County Federation of Jewish Agencies

Central New Jersey Jewish Federation

Clifton-Passaic Jewish Federation

Delaware Valley Jewish Federation

Metrowest United Jewish Federation

Greater Middlesex County Jewish Federation

Northern New Jersey JCRC

Southern New Jersey JCRC of Jewish Federation

Albuquerque JCC

Binghamton Jewish Federation of Broome County

Greater Buffalo Jewish Federation

Elmira CRC of Jewish Welfare Fund

Greater Kingston Jewish Federation

New York JCRC

Northeastern New York United Jewish Federation

Greater Orange County Jewish Federation

Rochester Jewish Community

Syracuse Jewish Federation

Utica Jewish Federation

Akron Jewish Community Federation

Canton Jewish Community Federation

Cincinnati JCRC

Cleveland Jewish Community Federation

Columbus CRC of Jewish Federation

Greater Dayton CRC of Jewish Federation

Greater Toledo CRC of Jewish Federation

Youngstown JCRC of Jewish Federation

Oklahoma City JCC

Tulsa JCC

Portland Jewish Federation

Allentown CRC of Jewish Federation

Erie JCC

Greater Philadelphia JCRC

Pittsburgh CRC of United Jewish Federation

Scranton-Lackawanna Jewish Federation

Greater Wilkes-Barre Jewish Federation

Providence CRC of Rhode Island Jewish Federation

Charleston JCR Committee

Columbia CRC of Jewish Welfare Federation

Memphis JCRC

Nashville and Middle Tennessee Jewish Federation

Austin JCC

Greater Dallas JCRC of Jewish Community Federation

El Paso JCR Committee

Fort Worth Jewish Federation

Greater Houston Jewish Federation

San Antonio JCR of Jewish Federation

Newport News-Hampton United Jewish Community of the Virginia Peninsula

Richmond Jewish Community Federation

Tidewater United Jewish Federation

Greater Seattle Jewish Federation

Madison JCC

Milwaukee Jewish Council

APPENDIX C

MEMBERS OF

THE COMMITTEE FOR PUBLIC EDUCATION

AND RELIGIOUS LIBERTY

PARTICIPATING IN THIS BRIEF

American Ethical Union

American Jewish Congress

Americans for Democratic Action

Americans for Religious Liberty

Anti-Defamation League of B'Nai B'rith

A. Philip Randolph Institute

Aspira of New York, Inc.

Association of Reform Rabbis of New York and Vicinity

Citizens Union of the City of New York

City Club of New York

Community Church of New York, Social Action Committee

Community Service Society

Council of Churches of the City of New York

Council of Supervisors and Administrators

Episcopal Diocese of L.I., Committee on Social Concerns and Peace

Humanist Society of Metropolitan New York, Inc.

Jewish War Veterans, Department of New York

League for Industrial Democracy, New York City Chapter

National Council of Jewish Women New York Section

National Service Conference of the American Ethical Union

New York Jewish Labor Committee

New York Society for Ethical Culture

New York State Congress of Parents and Teachers

Rochester Chapter of Americans United for Separation of Church and State

Social Concerns Work Area, St. Paul's Methodist Church, Northport, New York

Union of American Hebrew Congregations, New York Federation of Reform Synagogues

Unitarian-Universalist Ministers Association of Metropolitan New York

United Americans for Public Schools

United Community Centers, Inc.

United Federation of Teachers

United Parents Associations

United Synagogue of America, New York Metropolitan Region

Women's City Club of New York, Inc.

Workmen's Circle, New York Division